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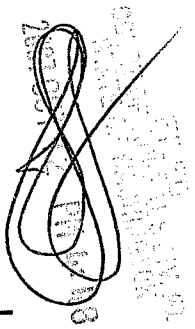

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BETH AND DOUG O'NEILL, individuals,

Appellants,

v.

CITY OF SHORELINE, a Washington municipal corporation, and DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity,

Respondents.

BRIEF OF RESPONDENT CITY OF SHORELINE

CITY OF SHORELINE

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I. INTRODUCTION

In this action, the O'Neills appeal the trial court's dismissal of their public records lawsuit against the City of Shoreline and Deputy Mayor Maggie Fimia. This appeal should be denied as (1) the statute gives discretion to decide the case solely on a show cause hearing upon affidavits; (2) the City fully responded to the public records requests submitted by appellants; and (3) *in camera* review of the hard drive was not required as no additional records existed.

Ultimately, this case is about the O'Neills' inability to obtain the metadata record associated with one email. The City provided a paper copy of the email requested by Ms. O'Neill. When the O'Neill request for metadata linked to the electronic record was received by the Deputy Mayor, the electronic version had been deleted. Deletion of this electronic version of the email was in full compliance with the Secretary of State's General Retention Schedule, which gives blanket authority to cities for the disposition of records. Finally, even if the metadata had been available at the time of the request, that metadata would not provide the appellants with any information not already provided.

The trial court found that the City had provided all responsive records to the O'Neills. Like most public records cases, the trial court decided this case wholly upon the legal memoranda and affidavits and

properly dismissed the case because the City demonstrated there had been no violation of law and no relief remained under the O'Neills' complaint.

II. STATEMENT OF CASE

A. Counter Statement of Facts

This case revolves around the City's response to five public records requests submitted by the O'Neills from September 18, 2006 to October 16, 2006, none of which requested any record in electronic format. *See Declaration of Beth O'Neill (hereafter O'Neill Decl.), Exs. D, F, G, I.*[1]

On September 18, 2006, Deputy Mayor Fimia was blind carbon copied on an email sent by Ms. Lisa Thwing, a Shoreline citizen. *CP 19.* The Deputy Mayor received the email from Ms. Thwing on her personal email account, mfimia@zpicon.com, which the Deputy Mayor uses both for personal emails and for City of Shoreline-related business emails. *Id.* Ms. Thwing sent the email to herself and blind carbon copied all recipients, including the Deputy Mayor. Under this blind carbon copy choice of transmittal, only Ms. Thwing appears on the recipient line. *CP*

[1] The O'Neills' attorney indicated in the O'Neills' opening brief that the trial court converted Beth O'Neill's declaration to an exhibit and this exhibit was not contained in the court's record. The City has not received a corrected brief with updated references to the Clerk's Papers for Beth O'Neill's declaration or corrected index to clerk's papers so the City is also referring to the O'Neill declaration directly.

20; CP 38-39. The blind carbon copied recipients do not appear on the email itself or in the metadata.[2] *CP 20.*

Ms. Thwing forwarded an email dated September 14, 2006 from Diane Hettrick, without adding any information or comments. *CP 19-20.* The recipients of Diane Hettrick's email were not listed on the email forwarded by Ms. Thwing. *CP 20; O'Neill Decl., Exhibit E.*

The Diane Hettrick email was as follows:

> **From:** Diane Hettrick <mailto: dhettrick@earthlink.net>
> **Sent:** Thursday, September 14, 2006 11:40 PM
> **Subject:** Current city council meeting being broadcast this week
>
> From my friend Judy:
>
> Hi Folks,
>
> My dear friend, Beth O'Neill has asked me to pass along information about our dysfunctional Shoreline City Council. Beth and some other folks have been working hard battling certain issues regarding an illegal rental in their neighborhood. What should be a legal and zoning issue has gotten mired into the politics of our 32nd District Democrats and certain City Council folks are playing favorites with their own political supporters.
>
> Anyway, try to watch the latest Council meeting (it airs at noon and 8pm every day on channel 21) and try to attend the next Council meeting at 6:30 next Monday in the

[2] The blind carbon copied recipients do not show up on metadata, as tested by Tho Dao, the City's Manager of Information Services. Following Ms. Thwing's procedure, Mr. Dao sent an email from himself to himself, and blind carbon copied the Deputy Mayor and other city staff. *CP 24.* When he printed the email and the metadata off of the Deputy Mayor's computer, only the Deputy Mayor's email address and her husband, who set up the email system, appeared in the metadata. *CP 24-25.* None of the other blind carbon copied recipients appeared on the metadata. *CP 25.*

> Rainier Room at the Shoreline Center. Beth has also asked me to let folks know that if they have any questions to give her a call at: 546-5672 and to pass along the request for lots of people to show up at the next Council meeting.
> Judy
>
> Coincidentally, I talked to Beth today and then read the statement she presented to the city council. This is very interesting and highly entertaining and I do suggest that you make an effort to watch the city council meeting this week. (Now if I could just get my channel switched off of Lake Forest Park)
> Diane

O'Neill Decl., Exhibit E.

On the evening of September 18, 2006, after receiving the email from Ms. Thwing, the Deputy Mayor attended a Shoreline City Council meeting. *CP 20.* At that meeting, the Deputy Mayor Fimia indicated that she had received an email today "from a Ms. Hettrick and a Ms. O'Neill." *CP 20; O'Neill Decl., Exhibit B-1.* Ms. O'Neill, in attendance at the Shoreline City Council meeting, questioned who sent the email and requested a copy of the email referred to by the Deputy Mayor.[3] *CP 20; O'Neill Decl., Exhibit B-1.*

After the City Council meeting on September 18, the Deputy Mayor reviewed the email on her computer and saw that Ms. O'Neill had not actually sent the email but, instead, was only mentioned in the email. *CP 21; O'Neill Decl, Exhibit E.* Thus, at the September 25, 2006 Council

[3] This request was later committed to writing and identified as PD 06-135. *CP 32.*

meeting, the Deputy Mayor clarified the statement she made at the September 18, 2006 Council meeting; specifically, that the email was originally from Diane Hettrick who had received it from a person named Judy. *CP 22.* The Deputy Mayor read the email out loud at the meeting. *Id.*

On September 19, 2006, in response to Ms. O'Neill's September 18, 2006 request, the Deputy Mayor forwarded the email to Carolyn Wurdeman, Executive Assistant to the City Manager for transmittal to the City Clerk for production. *CP 21.* In forwarding the email, the Deputy Mayor removed Ms. Thwing's forwarding information since she understood the request to be only for the Diane Hettrick email. *Id.* On September 20, 2006, the City Clerk's Office provided a paper copy of the email to Ms. O'Neill. *CP 32.* The produced document contained the body of the email, the sender information (Diane Hettrick), the date and time sent, and the subject line but did not include the recipients of the Diane Hettrick email, as these were never received by the Deputy Mayor. *CP 20; O'Neill Decl., Exhibit E.*

On September 20, 2006, Ms. O'Neill submitted a second written public records request, identified as PD 06-134, for:

> Email which Councilmember Fimia mentioned at the City Council meeting held on 9/18/06. Maggie Fimia said that the email was from Beth O'Neill and Ms. Hettrick. We are

> asking for all information relating to this email: how it was received by Maggie Fimia, from whom it was received, and the forwarding chain of the email.

CP 32; O'Neill Decl., Exhibit F.

On September 25, 2006, the Deputy Mayor Fimia forwarded the original email in electronic format to Ian Sievers, Shoreline City Attorney, to be provided in response to PD 06-134. *CP 22.* No information was removed from this email; it was in the same form as originally received by the Deputy Mayor from Ms. Thwing. *Id.* The City provided Ms. O'Neill with a hard copy of this original email on September 25, 2006. *CP 34.* Sometime after transmitting the original email to Mr. Sievers, Deputy Mayor Fimia deleted the original email from her email folder. *CP 22.*

On September 25, 2006, Ms. O'Neill submitted a third public records request, identified as PD 06-138, for:

> Email transmission attributed to Ms. Hettrick and Ms. O'Neill in a statement made by Deputy Mayor Fimia at the City Council meeting on 9/18/06. Any and all correspondence (including memos) relating to this and a complete transmission/forwarding chain and all metadata pertaining to this document.

CP 32; O'Neill Decl., Exhibit G.

In this request, Ms. O'Neill requested metadata associated with the subject email for the first time. *CP 22; O'Neill Decl., Exhibits E, F and G.*

On September 27, 2006, Ms. O'Neill submitted her fourth public records request, identified as PD 06-139, for:

> Copy of email that D.M. Fimia said she sent to 'Ms. O'Neill through the city' in which she said she asked 'whether or not she [Ms.O'Neill] said these things that were attributed to her. I would like any and all information relating to this email to include all metadata, memos, and any other correspondence relating to this document.

CP 32; O'Neill Decl., Exhibit I.

On September 29, 2006, the City responded to both PD 06-138 and 139 by providing one installment of records. *CP 32.* A second installment was provided on October 3, 2006. *CP 32.* Included in the second installment was a second paper copy of the original email, which the Deputy Mayor had requested Lisa Thwing resend, as well as a paper copy of the metadata associated with Ms. Thwing's email. *CP 21-22; O'Neill Decl., Exhibit L, Exhibit L, p.1-6.* The resent email from Ms. Thwing did not differ in substance or in form from the original email the Deputy Mayor had received from Ms. Thwing on September 18. *CP 22.* The second installment also exempted two emails as attorney-client privileged documents.[4] *CP 32.* In one of these attorney-client privileged documents,

[4] The first record exempted from disclosure as attorney-client privileged, an email from the City Attorney to Deputy Mayor Fimia, providing a legal analysis of whether the September 18, 2006 email was a public record, was mistakenly released to Ms. O'Neill on September 28, 2006 and lost its exemption status. *CP 32-33.* The second record exempted from disclosure as attorney-client privileged, an email from Councilmember Janet Way to outside legal counsel Steve DiJulio and Ramsey Ramerman that was sent in connection with another matter in which the attorneys were providing representation,

Councilmember Way forwarded the Thwing email to outside counsel. *O'Neill Decl., Exhibit L.* Councilmember Way's added questions and comments to the email were considered exempt as attorney-client privileged. *Id.* However, the City did release the Thwing email forwarded by Councilmember Way and the metadata associated with the Thwing email. *Id.*

On October 2, 2006, the Deputy Mayor Fimia brought her computer into the City of Shoreline for review by the Information Services Department ("IS) so that IS could attempt to locate the original electronic email forwarded from Ms. Thwing so that the metadata could be provided in response to PD 06-138. *CP 29.* The IS Department conducted a search of the Deputy Mayor's inbox and deleted items for the original email but was unable to locate the email. *CP 29-30.*

Ms. O'Neill's final public records request, submitted October 16, 2006 and identified as PD 06-154, requested:

> Any and all communications related to Public Disclosure requests I previously made through the City of Shoreline (PD 06-138, PD 06-139). This current request includes, but is not limited to, any and all email/voicemail communications that were sent/made relating to the above-listed Public Disclosure Requests.
>
> I am also requesting any and all communications including but not limited to

remains exempt. *CP 33.* It was provided for *in camera* review to the trial court, who deemed the record exempt. *CP 52; CP 141.*

> documents/files/memos/emails/voicemails to/from City Staff relating to the issue of the Email attributed to me by Deputy Mayor Fimia. Also, any related documents to this email (9/18/06 – attributed to me by Fimia) that may be in City of Shoreline computer system including but not limited to, the full transmission chain of that email (Note: email in question is one described in paragraph #2 above).

CP 32; O'Neill Dec., Exhibit N.

On October 23, 2006, the City responded to Ms. O'Neill's fifth public records request by providing twelve responsive documents. *CP 32; O'Neill Decl, Exhibit O.* Once the fifth and final response was provided, the City concluded that it did not have any remaining responsive records to Ms. O'Neill's five public records requests. *CP 34.*

B. Procedural History

The O'Neills were not satisfied with the City's public records responses and filed a Summons and Complaint, a Motion to Show Cause and a Motion to Lodge Public Records for *In Camera* Review and for Preparation of a Detailed Index of Records Withheld and Exemptions Alleged. After reviewing one attorney-client privileged document *in camera,* reviewing the affidavits and the legal memoranda, the trial court entered an order finding that:

1. The document submitted for *in camera* review is exempt for disclosure under Chapter 42.56 RCW.

2. All other responsive records that exist have been provided to the plaintiffs and an index or other information regarding the one exempt record that satisfies Chapter 42.56 has been provided to the plaintiffs.
3. The defendants have established no additional responsive records are available or contained on the computer hard drive of defendant Fimia and duplication of the hard drive for further in camera inspection is not warranted.

CP 141.

The court then dismissed the entire public records action. *CP 141.* The O'Neills' motion for reconsideration was denied by the court. *CP 348.* The O'Neills now appeal.

III. COUNTER STATEMENT OF ISSUES

(1) Can a trial court dismiss a Public Records Act ("PRA") case upon a show cause motion decided solely upon affidavits, as provided in the PRA and public records case law?

(2) Did the City unlawfully alter or destroy records in violation of the PRA?

(3) Was there substantial evidence for the trial court to find that defendants met their burden of proof that "all responsive records that

exist have been provided to plaintiffs" and that the defendants met their burden of proof that "no additional responsive records are available or contained on the computer hard drive of defendant Fimia and duplication of the hard drive for further *in camera* review is not warranted" leaving no other relief available under the complaint.

(4) Did the trial court err in issuing costs in favor of the City rather than the O'Neills?

IV. LEGAL ARGUMENT

A. Standard of Review

The City agrees with the O'Neills that the Court of Appeals reviews de novo an agency action challenged under RCW 42.56.030 through 42.56.520. RCW 42.56.550. The appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence. *Progressive Animal Welfare Society v. University of Washington*, 125 Wn. 2d 243, 252, 884 P.2d 592 (1994).

B. A Public Records Act Case May Be Dismissed at a Show Cause Hearing Decided Solely Upon Affidavits, as Provided in the PRA and Case Law.

The O'Neills assert that the trial court should have allowed presentation of evidence and argument at the show cause hearing. *Brief of*

Appellants at 41. The O'Neills further assert they are entitled to discovery, summary judgment and trial in this PRA litigation. *Id.* However, these assertions are contrary to public records cases and the Public Records Act itself.

The PRA specifically indicates that the trial court has discretion to decide show cause hearings solely on the affidavits. RCW 42.56.550, *Judicial review of agency action*, provides:

> ...
>
> (2) Upon motion of any person having been denied an opportunity to inspect or copy a public record by an agent, **the superior court in the county in which a record is maintained may require the responsible agency to show cause** why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.
>
> (3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceedings under this section. **The court may conduct a hearing based solely on affidavits.**
>
> ...

(emphasis added)

Indeed, show cause hearings decided solely on affidavits and legal memoranda are the usual method of resolving litigation under the PRA. *Wood v. Thurston County,* 117 Wn. App. 22, 68 P.3d 1084 (2003) (plaintiff not entitled to trial because PRA provides for the show cause hearing as the judicial remedy); *see also Brouillet v. Cowles Publishing Co.,* 114 Wn.2d 788, 791 P.2d 426 (1990) (court upheld trial court decision to bar oral testimony and decide the public disclosure case solely on motion and affidavits); *Limstron v. Ladenburg,* 136 Wn.2d 595, 963 P.2d 869 (1998) (case decided solely upon the documentary evidence, affidavits and memoranda of law); *Lindeman v. Kelso School Dist. No. 458,* 127 Wn.App. 526, 111 P.3d 1235 (2005) (motion to show cause denied and PDA claim dismissed); *Tacoma Public Library v. Woessner,* 136 Wn.2d 1030, 972 P.2d 101 (1998) (case decided on documentary evidence only, not testimonial evidence). The approach to deciding public records cases on affidavits serves the public interest since allowing long PRA trials "would make public disclosure act cases so expensive that citizens could not use the act for its intended purpose." *Broulliet at 801.*

The PRA's express provision for a show cause hearing solely on the affidavits and without oral argument is consistent with hearings on motions set forth in the Civil Rules. *Civil Rule 6 and King County Local Rule 7.* The O'Neills specifically did not request oral argument on the

motion. *CP 17.* Rather, they requested an order to show cause why the City should not make records available, pay plaintiffs costs and pay penalties. *CP 10-11.* The court denied the motion and dismissed the case as no requested relief remained.

The Washington State Attorney General Model Rules[5] provide nonbinding guidance on resolving PRA cases, indicating that speedy resolution is desired and that oral testimony at a show cause hearing and a full trial are both unnecessary:

> The act provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the act. RCW 42.17.340(1) and (2)/42.56.550(1) and (2). The purpose of the quick judicial procedure is to allow requestors to expeditiously find out if they are entitled to obtain public records. To speed up the court process, a public records case may be decided merely on the 'motion' of a requestor and 'solely on the affidavits.' RCW 42.17.340(1) and (3)/42.56.550(1) and (3).

WAC 44-14-08004(1); CP 169.

Here, the trial court properly resolved the litigation at the show cause hearing, based solely on the affidavits; a process selected by the O'Neills. This is consistent with published case law, the specific judicial

[5] The attorney general, as directed by the legislature, adopted advisory model rules on public records compliance. The purpose of the model rules is to provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act. The attorney general encourages state and local agencies to adopt the model rules. The City of Shoreline has not adopted the model rules, but nonetheless, the model rules still provide information about "best practices." The model rules are advisory only and do not bind any agency. However, the Attorney General indicates the

remedy provided in RCW 42.56.550 and the "quick judicial procedure" for resolving Public Records Act cases recognized by the Washington State Supreme Court in *Brouillet v. Cowles Publishing.* After weighing the declarations and the legal memoranda, the trial court found that "all responsive records that exist have been provided to the plaintiffs" and "the defendants have established that no additional responsive records are available or contained on the computer hard drive of defendant Fimia and duplication of the hard drive for further in camera inspection is not warranted." *CP 141.* The trial court dismissed the action since all relief requested by the plaintiffs in their complaint was denied. *Id.*.

C. The City Did Not Unlawfully Alter or Destroy Records in Violation of the PRA.

1. The City did not unlawfully alter records.

RCW 42.56.520 requires that a public agency, within five days of receiving a public records request, deny the request, respond by providing the relevant documents, or provide a reasonable estimate of the time needed to respond. Ms. O'Neill received the full, printed version of the email within five days of her clarified request, in compliance with RCW 42.56.520.

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rules should be carefully considered by agencies. WAC 44-14-0001 and WAC 44-14-00003.

On September 18, 2006, Ms. O'Neill orally requested a copy of the email mentioned by the Deputy Mayor at the September 18, 2006 meeting. *O'Neill Decl., Exhibit B-1.* She committed this request to writing on September 20, 2006 (identified as PD 06-135). *O'Neill Decl., Exhibit D.* The Deputy Mayor understood the request to be for the Diane Hettrick email that she had received; thus, on September 29, 2006, the Deputy Mayor provided the Diana Hettrick email in full, omitting only that portion of the email indicating who the Deputy Mayor had received the email from (i.e., Lisa Thwing). *CP 21.* It was the Deputy Mayor's understanding that the Thwing forwarding email had not been requested. *Id.*

On September 20, 2006, the same day the City produced the Diane Hettrick email, Ms. O'Neill then clarified that she desired all information regarding how and from whom the email was received and the forwarding chain of the email. *CP 32; O'Neill Decl., Exhibit F.* Once this request was received, the Deputy Mayor forwarded the complete email, without alteration or omission, to the City Attorney for production. *CP 22.* On September 25, 2006, Ms. O'Neill was provided with a complete paper copy of the email. *CP 34.*

There was no improper alteration of an email. Ms. O'Neill's oral request on September 18 and her first written request on September 20

referred only to the email that referenced Ms. O'Neill. Deputy Mayor Fimia was effectively redacting the non-responsive Thwing email information. Once the full email was requested, the City produced it within five days.

Thus, Ms. O'Neill received the complete, unredacted email within five days of her request. The City's response was timely and complete. At no time was an electronic format of the record requested. *See O'Neill Decl., Exs. D, F, G, I.*

2. **Deletion of the email was consistent with the general retention schedule.**

In determining when to dispose of or retain a record, the City looks to the Records Management Guidelines (hereafter "Records Management Guidelines" or "Guidelines"). The Guidelines provide instructions and guidelines for public records management based on Chapter 40.14 RCW and are approved and issued by the Secretary of State-Washington State Archives and Records Management Division and the Washington State Local Records Retention Committee for use by all local government agencies in the State of Washington. *CP 58 and 60*; RECORDS MANAGEMENT GUIDELINES (Office of the Secretary of State – Division of Archives and Record Management, June 2001) at I. The Guidelines state:

> E-mail records should be filed with the appropriate records series and be disposed of according to the retention period

> approved for that records series on either the general records retention schedule or a records retention schedule approved specifically for the agency by the Local Records Committee.

Id. at 30; CP 90.

The Guidelines define the general records retention schedule as:

> A schedule, listing and assigning minimum retention periods to individual records series, which is approved for all local government agencies, or particular agencies, by the Local Records Committee. **General records retention schedules provide the agencies they cover with continuing blanket authority for the disposition of commonly held records according to their assigned retention periods.**

Id. at 46; CP 106 (emphasis added).

The general records retention schedule in existence in 2006[6], the year of Ms. O'Neill's requests, directed agencies to treat the electronic copy of an email as a transitory, duplicate copy that should be deleted once the electronic copy is no longer needed. *CP 35-36.* The retention schedule specifically stated:

> Email messages with public record content should be retained in E-mail format only as long as they are being worked on or distributed. **Upon completion, E-mail messages containing public record information should be printed out or transferred to an electronic**

[6] The Local Records Committee updated the records retention schedule on May 31, 2007, amending the Electronic Information section. LOCAL GOVERNMENTS GENERAL RECORDS RETENTION SCHEDULE, Secretary of State - Washington State Archives, http://finditconsumer.wa.gov/ReportServer/Pages/ReportViewer.aspx?%2fLRSReport%2fGenSchedule&rs:Command=Render, page 37.

> **document managing system,** filed with the appropriate records series, and retained for the minimum retention period assigned by the Local Government General Records Retention Schedule, or a records retention schedule approved specifically for the agency by the Local Records Committee.

LOCAL GOVERNMENTS GENERAL RECORDS RETENTION SCHEDULE, Secretary of State - Washington State Archives, *page 37; CP 36;* (emphasis added).

The Record Management Guidelines, in the section entitled "Frequently Asked Questions About E-Mail Retention," answer the question "Can I print messages, and then delete them?" as follows:

> Yes, provided you print the following information with the message: name of sender, name of recipient, date and time of transmission and/or receipt. You then file the printed message with the appropriate records series and retain it according to the retention approved for that series by the Local Records Committee.

RECORDS MANAGEMENT GUIDELINES *at 31; CP 91.*

On September 25, 2006, Ms. O'Neill submitted PD 06-138, where she requested metadata for the first time. *O'Neill Decl., Exhibit G.* Ms. O'Neill did not define metadata; the City considered metadata to be "data about data," meaning the embedded data within a document or email that may not be visible in normal circumstances, such as creation date, hidden text, and author information. *CP 41.* This request for metadata was received after the City had provided Ms. O'Neill the complete, written copy of the email at issue. *CP 32.* After receiving the request for

metadata, the Deputy Mayor searched her computer but could not locate the electronic version of the email. *CP 22.* Once Ms. O'Neill request for metadata was received, the email had already been printed, retained and filed and the transitory, duplicate electronic copy deleted in compliance with the retention schedule, and the metadata was no longer available. *CP 22; CP 34-35.*

The timing is important here. If Ms. O'Neill had made a timely request for metadata, the City could have produced it. However, once the Deputy Mayor had produced the full email requested, she was no longer using the email and it was deleted in compliance with the retention schedule. Once the Deputy Mayor received the request for metadata, it could not be provided.

The O'Neills argue that the City and the Deputy Mayor had received the metadata request prior to deletion. This is inaccurate. Ms. O'Neill's first request for metadata occurred on September 25, 2006 in PD 06-138. Her September 20 request, identified as PD 06-134, was *not* a request for metadata. PD 06-134 requested the "[e]mail which Councilmember Fimia mentioned at the City Council meeting held on 9/18/06" and "all information relating to this email: how it was received by Maggie Fimia, from whom it was received, and the forwarding chain of the email." First, this request for "all information relating to this email" is

not an appropriate request for records. "An important distinction must be drawn between a request for information about public records and a request for the records themselves. The act does not require agencies to research or explain public records .... Nor does the act require public agencies to be mind readers." *Bonamy v. City of Seattle*, 92 Wn. App. 403, 450-51, 960 P.2d 447 (1998).

Second, "all information relating to this email" is not the same as requesting the metadata associated with a document. The City cannot be expected to be, and, indeed, is not required to be, a mind reader.

The O'Neills attempt to analogize the Deputy Mayor and City's actions in this case to the actions of defendants in *Krunweide v. Brighton Assocs., LLC,* 2006 WL 1308629 (N.D. Ill. May 8 2006), *Landmark Legal Foundation v. EPA,* 272 F. Supp. 2d 70 (D.D.C. 2003), and *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640 (D. Kan. 2005). All of these cases are distinguishable from the case at hand.

First, in *Krunweide* a U.S. District Court case from the foreign jurisdiction of Northern District of Illinois, the court found the plaintiff had willfully and in bad faith engaged in spoliation of evidence (documents on his laptop) in violation of a court order to compel the surrender of the laptop. There is no such violation here. Indeed, the Deputy Mayor did not act willfully or in bad faith in deleting the email.

CP 23. In addition, the Deputy Mayor received Ms. O'Neill's request for the metadata *after* the email had been printed out, retained and deleted in compliance with the retention schedule, not before.

In *Landmark Legal Foundation*, the EPA reformatted hard drives, erased and reused backup tapes and deleted emails after the court issued a preliminary injunction to refrain from tampering with responsive information. This case is off point for the same reason; there is no violation of a court order by the City. The Deputy Mayor received Ms. O'Neill's request for the metadata *after* the email had been printed out, retained and deleted in compliance with the retention schedule, not before.

Third, in *Williams,* in response to the court's order to produce spreadsheets in a native format, the defendant produced the spreadsheets in electronic format but scrubbed the metadata and locked cells. Never once did Ms. O'Neill request the document in electronic form. *See O'Neill Decl. Exs. D, F, G, I.* If she had, and in response the City produced the electronic version with scrubbed metadata or refused to produce the metadata it had in its possession, *Williams* might be applicable. However, the City did not scrub metadata and did not withhold metadata from Ms. O'Neill. Thus, *Williams* is inapplicable to the case at hand.

Ultimately, however, the City was able to provide metadata associated with the email. Councilmember Janet Way forwarded as an

attachment the September 18 Lisa Thwing email to outside counsel, as she was apparently also a blind carbon copied recipient of the email. *O'Neill Decl., Exhibit L.* Although the City exempted Councilmember Way's substantive email to outside counsel, the City did provided the September 18 Lisa Thwing email and associated metadata of this email.[7] *Id.* This metadata included the following information:

- Janet Way received the email at janetway@yahoo.com on September 18, 2006, 07:55:31-0700. *O'Neill Decl., Exhibit L, p.4, line 1.*

The email Councilmember Way received from Ms. Thwing on September 18 was the same email received by Deputy Mayor Fimia, as the following information appears in the metadata:

- From: "Lisa Thwing"<tootrd@comcast.net>
  To: "Lisa Thwing"<tootrd@comcast.net>
  Subject: Current city council meeting being broadcast this week
  Date: Mon, 18 Sep 2006 07:55:38-0700

O'Neill Decl., Exhibit L, p.4, line 10-13.

The original email received by the Deputy Mayor has the exact same information in the "from," "to," "subject" and "date" lines. *O'Neill Decl., Exhibit J, p.21.*

[7] The City provided the metadata of this exempt email in response to Ms. O'Neill expanded request to include not just the email received by Deputy Mayor Fimia, but also "any other correspondence relating to this document." *O'Neill Decl., Exhibit I.*

Thus, although the City could not provide metadata from the Thwing email received by the Deputy Mayor, the O'Neills received metadata on the Thwing email from Councilmember Way's version.

Even if the City was able to provide the metadata associated with the Deputy Mayor's copy of the Thwing email, that data would not provide Ms. O'Neill with any information. The recipients of the email would not appear on the metadata since Ms. Thwing forwarded the email from Ms. Hettrick to herself and blind carbon copied all other recipients, and blind carbon copied recipients do not appear on the metadata. *See footnote 2; CP 38-39; see also Councilmember Way's metadata at O'Neill Decl., Exhibit L, p.4-6.*

D. The City Met its Burden of Proof that All Responsive Records were Provided to Plaintiffs and that No Additional Responsive Records are Available or Contained on the Computer Hard Drive of Defendant Fimia and Duplication of the Hard Drive for Further *In Camera* Review is Not Warranted

RCW 42.56.550 places the burden of proof on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part. The evidence, through the declarations and legal memoranda, shows that the City met this burden, and shows that, as the trial court found, the "plaintiffs cannot overcome the City's show of proof that it has fully and completely responded in a lawful and appropriate manner." *CP*

141. Specifically, the Records and Information Manager clearly stated: "[t]he City does not possess any records in addition to the records already provided or identified as exempt that are responsive to plaintiff's give public disclosure requests." *CP 34.* The trial court properly concluded that the City had no remaining responsive records and *in camera* review was unnecessary.

The O'Neills claim that the City's search for the electronic copy of the original email was inadequate. The O'Neills claim, without citing any expert testimony, that: "Fimia's hard drive may have contained tens of thousands of folders, any one of which might have contained the missing public record or other responsive public records," *Brief of Appellants at 35.* First, the O'Neills' reference to "records" is misleading and at the same time telling. The City has consistently shown that only the metadata of one record could not be provided and that all other records had been provided. The O'Neills have pointed to no evidence that the City has withheld records.

Second, the argument that a hard drive may contain tens of thousands of folders where a record might be found is the equivalent of stating for a paper record that there are thousands of files in other filing cabinets in other offices throughout City Hall that the O'Neills are entitled

to search. Allowing appellants to indiscriminately sift through the Deputy Mayor's hard drive is not authorized by the PRA.

> Just as the Act does not provide a 'right to citizens to indiscriminately sift through an agency's files in search of records or information which cannot be reasonable identified or ascribed to the agency,' *Limstrom* 136 Wn. 2d. , 604-605 n.3. 963 P.2d 869, the Act does not authorize indiscriminate sifting through an agency's files by citizens searching for records that have been demonstrated not to exist.

Sperr v. City of Spokane, 123 Wn. App. 132, 96 P.3d 1012 (2004).

The O'Neills claim, without citing to any expert testimony, that "the City's search of Fimia's hard drive was inadequate by even common-sense standards." *Brief of Appellants at 34.* However, when the City's expert on the email storage system stated there is nothing to be found in the places the record should be found, no rebuttal was offered by the O'Neills. The trial court determined that all responsive records had been produced, agreeing with the City that searching the hard drive for responsive records would be unfruitful. Since the trial court has the authority to decide a public records case on the motion and solely on the affidavits, the O'Neills should have provided expert affidavits testifying to their points. Assertions by the attorney cannot be considered expert testimony on retrieval of electronic documents.

E. The City is Not Seeking Costs, and the O'Neills are Not the Prevailing Party and Should Not be Awarded Attorney Fees and Costs.

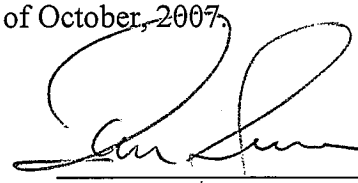
The City recognizes that there may be a question of whether costs may be granted to an agency. However, the City clearly dropped this request for costs in the City's motion before the trial court and it is no longer at issue. *CP 331.* The City has no objection to the Court striking this portion of the order since it is consistent with the City's position in the trial court proceeding.

The O'Neills are not a prevailing party within the meaning of RCW 42.56.550 (4) and are not entitled to attorney fees, costs or penalties under the PRA. Generally, the "prevailing party," for purposes of attorney fee award, is the party who receives a judgment in his or her favor. *Smith v. Okanogan County, 100 Wn. App., 7, 24, 994 P.2d 857 (2000).* The O'Neills position on costs was conceded by the City and no appeal was necessary. If the case is remanded, attorney fees should abide the results of that remand.

V. CONCLUSION

For the foregoing reasons, the City respectfully requests that the O'Neills appeal of the trial court order dismissing their lawsuit against the City be denied and this appeal be dismissed.

DATED this 12th day of October, 2007.



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Attorney for Respondent City of Shoreline

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

BETH AND DOUG O'NEILL, individuals Appellants, v. CITY OF SHORELINE, a Washington municipal corporation and DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity, Respondents.	No. 59534-2-1 **CERTIFICATE OF SERVICE**

I, Ian Sievers, hereby declare under penalty of perjury under the laws of the State of Washington, that I caused to be served a true and correct copy of the, Brief of Respondent City of Shoreline, including a copy of this Certificate of Service, by hand delivery on October 12, 2007, to the Court of Appeals, Division I and to the following party of record:

Michael G. Brannan
2033 Sixth Avenue
Suite 800
Seattle, WA 98121-2567

Dated this 12th day of October, 2007

Ian R. Sievers
City Attorney
City of Shoreline